

Issue: Qualification – Discipline (counseling memo); Ruling Date: June 18, 2015;
Ruling No. 2015-4168; Agency: Department of Juvenile Justice; Outcome: Not
Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Juvenile Justice
Ruling Number 2015-4168
June 18, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether her February 19, 2015 grievance with the Department of Juvenile Justice (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about January 20, 2015, the grievant received a Formal Written Counseling for unsatisfactory job performance. The grievant initiated a grievance to challenge the Formal Written Counseling on February 19, 2015. In the grievance, the grievant claims there are “[f]alse statements on [the] Formal Written Counseling letter” and requests that it be removed “from all files.” After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.¹ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management’s decision, or whether state policy may have been misapplied or unfairly applied.³

Further, the grievance procedure generally limits grievances that qualify to those that involve “adverse employment actions.”⁴ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

³ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁴ See *Grievance Procedure Manual* § 4.1(b).

as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶

The management action challenged in this grievance, a Formal Written Counseling, is a form of written counseling. It is not equivalent to a Written Notice of formal discipline. A written counseling does not generally constitute an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.⁷ Therefore, the grievant’s claims relating to her receipt of the Formal Written Counseling do not qualify for a hearing.⁸

While the Formal Written Counseling has not had an adverse impact on the grievant’s employment at this time, it could be used later to support an adverse employment action against her. Should the Formal Written Counseling grieved in this instance later serve to support an adverse employment action against the grievant, such as such as a transfer, a demotion, a formal Written Notice, or a “Below Contributor” annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of the Formal Written Counseling through a subsequent grievance challenging the related adverse employment action.⁹

EDR’s qualification rulings are final and nonappealable.¹⁰



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁵ Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

⁶ Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁷ See Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

⁸ Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the “Act”). Under the Act, if the grievant gives notice that he wishes to challenge, correct, or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This “statement of dispute” shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

⁹ Some of the information in the grievance record appears to relate to issues with the grievant’s employment that occurred after the initiation of the grievance. Because additional management actions or omissions cannot be added to a grievance after it is filed, this ruling will not address those claims. *Grievance Procedure Manual* § 2.4. The grievant may file another grievance if she wishes to challenge additional management actions or omissions.

¹⁰ See Va. Code § 2.2-1202.1(5).